Allied Capital Sdn Bhd v Mohamed Latiff bin Shah Mohd and another application

FEDERAL COURT (KUALA LUMPUR) — APPLICATIONS NO 08–32 OF 1996(W) AND NO 08–34 OF 1996(W)

STEVE SHIM CJ (SABAH AND SARAWAK), SITI NORMA YAAKOB AND MOHTAR ABDULLAH FCJJ

12 APRIL 2001

Civil Procedure *— Appeal — New points, introduction of — Appellant raised question of propriety of judge presiding in the Court of Appeal — Judge has made full disclosure of facts to counsels — No objection raised in the course of proceedings of appeal in the Court of Appeal — Whether appellant allowed to raise objection in the Federal Court — Whether leave to appeal ought to be granted*

Civil Procedure *— Appeal — New points, introduction of — Concurrent decision of High Court and Court of Appeal — Appellant raised question of propriety of judge presiding in the Court of Appeal — Whether appellant has raised question of general public principle which the court has not previously decided — Whether leave to appeal ought to be granted*

On 26 May 1996, the Court of Appeal affirmed the High Court's decision in respect of the disputes concerning The Raintree Club of Kuala Lumpur ('the Club'). Allied Capital Sdn Bhd ('Allied') and Tengku Abdullah ibni Sultan Abu Bakar and eight others ('the promoters') applied to the Federal Court for leave to appeal against the whole of the decision of the Court of Appeal pursuant to s 96 of the Courts of Judicature Act 1964. Allied had raised as its first primary point, the issue of bias on the part of the judge who presided in the Court of Appeal on the grounds: (i) the judge's membership of the club; and (ii) the allegation that he had acted professionally for Allied on the very matters in issue in this suit.

Held, dismissing the application:

(1) The court was satisfied that the judgment of the Court of Appeal had not raised any question of general public principle which the Federal Court had not previously decided or any question of importance upon which further argument and a decision of the Federal Court would be to public advantage. The concurrent decisions of the High Court and the Court of Appeal on the issues were in fact mere applications of well established principles of law to the particular facts of the case. In such a situation, it would be highly unlikely that an appellate court would disturb such concurrent decisions. Therefore, the court was satisfied that even if leave was given, the applicants would prima facie not succeed in the appeal (see p 309B–D).

(2) The judge had made full disclosure of the facts to counsels. In the absence of any objections from counsel present, the judge had genuinely believed that he could continue to sit as a member of the coram hearing the appeal. No objection was raised in the

course of the proceedings as to the propriety of the judge hearing the appeal. If Allied had any misgivings as to the position of the judge they had ample time to cross check with their officers or solicitors, past or present. It is in the interest of justice that counsel should raise objection at the earliest possible opportunity upon disclosure by the judge (see p 311D–G).

(3) Having expressed its confidence in the judge to continue hearing the case by its participation in the appeal without any reservation, Allied could not now raise this objection as a ruse to set aside 'irrespective of the merits' an otherwise perfect judgment. Allied's attempt to raise this objection smacks of an afterthought (see p 311H–I).

(4) The court did not find any reason to doubt the judge's impartiality and integrity as a judge in this case. His candour in disclosing his interest was laudable, his conduct of the case was unblemished, and the judgment he delivered on behalf of the Court of Appeal clearly showed that the objection by Allied was without merit. Accordingly the court found that Allied's application for leave to appeal based on this issue of bias also failed (see pp 313I–314A).

[**Bahasa Malaysia summary**

Pada 26 Mei 1996, Mahkamah Rayuan telah mengesahkan keputusan Mahkamah Tinggi berhubung pertikaian-pertikaian yang berkaitan The Raintree Club of Kuala Lumpur ('Kelab tersebut'). Allied Capital Sdn Bhd ('Allied') dan Tengku Abdullah ibni Sultan Abu Bakar dan lapan yang lain ('promoter-promoter tersebut') telah memohon kepada Mahkamah Persekutuan untuk kebenaran merayu terhadap keseluruhan keputusan Mahkamah Rayuan menurut s 96 Akta Mahkamah Kehakiman 1964. Allied telah menimbulkan sebagai perkara yang paling utama, isu berat sebelah di pihak hakim yang bersidang dalam Mahkamah Rayuan atas alasan-alasan: (i) keahlian kelab hakim tersebut; dan (ii) dakwaan bahawa beliau telah bertindak secara profesional bagi pihak Allied tentang perkara -perkara utama yang menjadi isu di dalam guaman ini.

Diputuskan, menolak permohonan tersebut:

(1) Mahkamah berpuas hati bahawa penghakiman Mahkamah Rayuan tidak menimbulkan apa-apa persoalan prinsip am awam yang Mahkamah Persekutuan sebelum ini telah memutuskan atau apa-apa persoalan penting di mana hujah lanjutan dan satu keputusan Mahkamah Persekutuan akan menjadi kelebihan awam. Keputusan-keputusan bersama Mahkamah Tinggi dan Mahkamah Rayuan tentang persoalan-persoalan tersebut pada hakikatnya hanya permohonan-permohonan prinsip undang-undang yang sudah mapan terhadap fakta-fakta khusus kes. Di

dalam keadaan sedemikian, kemungkinan besar bahawa suatu mahkamah rayuan akan mengganggu keputusan-keputusan bersama tersebut. Oleh itu, mahkamah berpuas hati bahawa walaupun kebenaran telah diberikan, pemohon-pemohon secara prima facie tidak akan berjaya dalam rayuan tersebut (lihat ms 309B–D).

(2) Hakim telah membuat pendedahan penuh tentang fakta-fakta tersebut kepada peguam-peguam. Dengan ketiadaan apa-apa bantahan daripada peguam yang hadir, hakim telah dengan suci hati mempercayai bahawa beliau dapat menyambungkan keahliannya dalam korum untuk pendengaran rayuan tersebut. Tiada bantahan telah ditimbulkan semasa prosiding berjalan berhubung kesuaian hakim mendengar rayuan tersebut. Jika Allied mempunyai apa-apa rasa ragu-ragu tentang kedudukan hakim mereka mempunyai masa secukupnya untuk memeriksa balas dengan pegawai-pegawai atau peguam-peguam, yang dahulu dan kini. Adalah untuk kepentingan keadilan bahawa peguam sepatutnya menimbulkan bantahan pada peluang yang paling awal sekali apabila pendedahan dibuat oleh hakim (lihat ms 311D–G).

(3) Setelah menyatakan keyakinannya dalam hakim tersebut untuk terus mendengar kes tersebut dengan penyertaannya dalam rayuan tersebut tanpa apa-apa keraguan, Allied tidak boleh sekarang menimbulkan bantahan ini sebagai satu muslihat untuk mengenepikan 'tanpa mengira merit-merit' jika tidak satu penghakiman yang sempurna. Percubaan Allied untuk menimbulkan bantahan ini adalah betul-betul sesuatu yang difikirkan kemudian (lihat ms 311H–I).

(4) Mahkamah tidak mendapati apa-apa sebab untuk meragui keadilan dan integriti hakim tersebut sebagai seorang hakim dalam kes ini. Sikap berterus terang beliau dalam mendedahkan kepentingan beliau patut dipuji, pengendalian beliau terhadap kes tersebut tidak cacat. dan penghakiman yang disampaikan oleh beliau bagi pihak Mahkamah Rayuan dengan jelas menunjukkan bahawa bantahan oleh Allied adalah tanpa merit (lihat ms 313I–314A).]

Notes

For cases on the introduction of new points in appeal, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 742–784.

Cases referred to

Datuk Syed Kechik bin Syed Mohamed & Anor v The Board of Trustees of the Sabah Foundation & Ors and another application [1999] 1 MLJ 257 (refd)

Hock Hua Bank (Sabah) Bhd v Yong Liak Thin [1995] 2 MLJ 213 (refd)

Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan Bhd [1999] 3 MLJ 1 (refd)

R v Gough [1993] AC 646 (refd)

Regina v Bow Street Metropolitan Stipendiary Magistrate & Ors; Ex parte Pinochet Ugarte (No 2) [1999] 2 WLR 272 (refd)

Tengku Abdullah ibni Sultan Abu Bakar & Ors v Mohd Latiff bin Shah Mohd & Ors and other appeals [1996] 2 MLJ 265] (refd)

Legislation referred to

Anti-Corruption Act 1997 s 15(1), (2)
Judges Code of Ethics 1994 para 3(1)(a),(b), (c)
Courts of Judicature Act 1964 s 96
Federal Constitution art 125, cl (3A)

RR Sethu (*Jaya Ramachandran* with him) (*Balendran Chong & Bodi*) for the applicant in Application No 08–32 of 1996(W).

Cecil Abraham (*Rabindra S Nathan* and *Rishwant Singh* with him) (*Shearn Delamore & Co*) for the applicants in Application No 08–34 of 1996(W).

Raja Aziz Addruse (*Benjamin Yean* and *Liza Chan* with him) (*Liza Chan & Co*) for the respondents in Applications No 08–32 of 1996(W) and No 08–34 of 1996(W).

Mohtar Abdullah FCJ. (delivering judgment of the court): On 21 May 1996, Gopal Sri Ram JCA delivered the judgment of the Court of Appeal [reported in *Tengku Abdullah ibni Sultan Abu Bakar & Ors v Mohd Latiff bin Shah Mohd & Ors and other appeals* [1996] 2 MLJ 265] in respect of the disputes concerning The Raintree Club of Kuala Lumpur ('the Club'), affirming the decision of Zakaria J (as he then was) in the High Court, with a slight variation as to costs.

Allied Capital Sdn Bhd ('Allied') [the applicant in 08–32–96(W)] and Tengku Abdullah ibni Sultan Abu Bakar and eight others ('the promoters') [the applicants in 08–34–96(W)] now apply to the Federal Court for leave to appeal against the whole of the said decision of the Court of Appeal pursuant to s 96 of the Courts of Judicature Act 1964 (the CJA').

As clearly restated by Edgar Joseph Jr FCJ in *Datuk Syed Kechik bin Syed Mohamed & Anor v The Board of Trustees of the Sabah Foundation & Ors and another application* [1999] 1 MLJ 257 at p 260:

> It is not the practice of this court, nor as we understand it, the practice of the House of Lords, when sitting in its judicial capacity hearing application for leave to appeal, to give explicit reasons for granting or refusing leave, save in

circumstances where their Lordships considered that they had no jurisdiction to entertain the application.

We would similarly adopt the same time-honoured practice by briefly noting that we have heard the submissions by Dato RR Sethu and Mr Cecil Abraham on behalf of Allied and the promoters respectively and also the reply by Raja Aziz Addruse on behalf of the respondents. We are satisfied that the High Court and the Court of Appeal had made concurrent findings on primary issues such as whether the promoters of the Club stood in a fiduciary capacity to the Club; whether, as fiduciaries, they had acted in breach of their fiduciary duties; whether there was any injury resulting from such breach of fiduciary duties, and if so, whether the proper relief was asked for and given. There is also the issue whether the respondents, as members of the Club, had the standing to bring the action on behalf of the other members of the Club (other than the promoters) in a representative capacity. We are satisfied that the judgment of the Court of Appeal has not raised any question of general principle which the Federal Court has not previously decided or any question of importance upon which further argument and a decision of the Federal Court would be to public advantage. The concurrent decisions of the High Court and the Court of Appeal on the said issues are in fact mere applications of well-established principles of law to the particular facts of the case. In such a situation, it would be highly unlikely that an appellate court would disturb such concurrent decisions. We are, therefore, equally satisfied that, even if leave is given, the applicants would prima facie not succeed in the appeal.

Our decision, as above, would ordinarily have disposed of these applications under s 96 of the CJA. However, the matter does not end there. Allied has in fact raised as its first primary point the issue of bias on the part of the learned judge who presided in the Court of Appeal and delivered its judgment as abovesaid. The objection is founded on two grounds, firstly, the learned judge's membership of the Club and secondly, the allegation that he had acted professionally for Allied on the very matters in issue in this suit. In view of the serious implications in law arising out of this objection, we are now compelled to deal with this issue at length.

One Yusof bin Abu Bakar, a director of Allied, in his affidavit affirmed on 18 November 1996 avered as follows:

> 9 The appellant/applicant does not question the integrity and ability of Yang Arif Dato' Justice Gopal Sri Ram as a judge of the Court of Appeal. However, I believe that the rules of natural justice are so fundamental that the decision intended to be appealed against ought to be set aside irrespective of the merits and I also believe that the appeal against the decision of the High Court dated 6 February 1995 be remitted to and heard de novo by another panel of the Court of Appeal.

The allegations raised clearly show how seriously Allied now complains about the conduct of the learned judge after judgment was delivered not in its favour. We wonder whether the same objection would have been raised

if Allied had won its case. We agree that the issues raised affect a very fundamental aspect of the administration of justice and public confidence in the system of justice. The principles of law on bias and disqualification of judges from hearing a case are so basic and entrenched in our judicial psyche that any aberration from the norms of ethical behaviour would be frowned upon.

A study of authorities on apparent bias in the UK clearly shows conflicting opinions as to the correct test to be applied — whether it's the 'reasonable suspicion' of bias test or the 'real likelihood' of bias test, or, after the decision in *R v Gough* [1993] AC 646, the 'real danger' of bias test. In *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan Bhd* [1999] 3 MLJ 1, at pp 69–70, Edgar Joseph Jr FCJ, delivering judgment on behalf of the Federal Court summed up the stand of the Federal Court:

> The 'real danger' test favoured in *R v Gough* could be seen as a compromise between the 'reasonable suspicion' of bias test and the 'real likelihood' of bias test so as to stress 'that the Court is contemplating a lower standard than likelihood' or 'probability of bias', that is to say, a 'real possibility of bias': see Gough at pp 668 C–D, 670 E–F, per Lord Goff; p 671 B–C per Lord Woolf.
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> It is also important to note that the question of bias has to be answered by considering all the facts not merely by reference to the view of the hypothetical reasonable man (*R v Gough*, per Lord Goff, at p 670D–E).
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> Having given careful consideration to the matter, we prefer the test of apparent bias given in *R v Gough* ('the real danger of bias' test) as this will avoid setting aside of judgment upon some insubstantial grounds and the flimsiest pretexts of bias.

Regina v Bow Street Metropolitan Stipendiary Magistrate & Ors; Ex parte Pinochet Ugarte (No 2) [1999] 2 WLR 272 ['the *Pinochet*'s case'] also discussed the aforesaid tests. In that case, the House of Lords set aside its earlier decision when it was disclosed after delivery of judgment in the earlier appeal that Lord Hoffman, one of the members of the Appellate Committee who heard the appeal, had some link with Amnesty International, an intervener in the appeal, in that he was an unpaid director of the Amnesty International Charity Ltd ('AICL'), a charity which was wholly controlled by Amnesty International. It was held that the relationship between Lord Hoffmann and Amnesty International through his directorship in AICL, led to the automatic disqualification of Lord Hoffmann from sitting on the hearing of the said appeal without the need to investigate whether there was a likelihood or suspicion of bias in the circumstances of that case.

It must be remembered, though, that in the Pinochet's case Lord Hoffmann had never declared his interest or link to a party in that appeal. He continued to sit until judgment was delivered, by a majority of three to two (Lord Hoffmann being a member of the majority) that Pinochet was not four entitled to immunity. Needless to say, this decision

was in favour of Amnesty International and other parties allied to its cause. It was later rumoured that Lord Hoffmann's wife was connected with Amnesty International in some way and subsequently a man anonymously telephoned Pinochet's solicitors alleging that Lord Hoffmann was a director of the AICL. That allegation was repeated in a newspaper report, and to cut a long story short, Pinochet subsequently lodged a petition praying that the earlier decision of the House of Lords should either be set aside completely or the opinion of Lord Hoffmann should be declared to be of no effect. The sole ground relied upon was that the links between Lord Hoffmann and Amnesty International were such as to give the appearance that he might have been biased against Pinochet.

The facts in our present case are entirely different. At the earliest possible opportunity before the commencement of the hearing of the appeal, the learned judge had seen counsels in chambers in the presence of his brother judges who were empanelled to hear the appeal. The learned judge had in fact disclosed his interest in the case by informing counsels that he was a member of the Club. He had specifically inquired whether any one of the counsels present had any objection to him being a member of the panel hearing the appeal. No one, not even counsel for Allied, raised any objection. Pursuant to a query raised by Mr Abraham, counsel for the promoters, the learned judge disclosed that when he was a member of the Bar, he had acted in a brief which he originally thought was connected with the subject matter of the appeal. He had checked with his former office and was informed that he had not acted for any of the parties in' the appeal, that his client was the Ayala Group from the Philippines and that the brief involved a subject which was unconnected with the subject matter of the appeal. That was what the learned judge was informed by his former office. That was the position he believed himself to be in i.e. that he was a member of the Club, that he had not acted for any of the parties and that the subject matter of that brief was unconnected with the subject matter of the appeal to be heard by him. He had accordingly made full disclosure of these facts to counsels. In the absence of any objections from counsels present, the learned judge had genuinely believed that he could continue to sit as a member of the coram hearing the appeal. The records do not show any advice or opinion to the contrary by the other two learned judges present. Obviously all three judges and all parties concerned were satisfied that the interest of justice would not be compromised in the circumstances of that case. The Court of Appeal then sat from 5–9 February 1996, hearing submissions by counsels. No objection was raised in the course of the proceedings as to the propriety of the learned judge hearing the appeal. If Allied, its directors or counsels had any misgivings as to the position of the learned judge, they had ample time to cross-check with their officers or solicitors, past or present. Counsel for Allied could have asked for time to look into the matter if he or his client had any apprehension or misgiving in the matter. To support their allegation on the second ground. Allied produced an affidavit affirmed on 4 October 1996 by Junaidah bte Mohd Said, a solicitor acting for Allied in 1984 in connection with the project for

the setting up of the Club. She alleged that the learned judge had in fact acted for Allied and had given legal advice on a matter in issue in the said appeal. It is in the interest of justice that counsel should raise objection at the earliest possible opportunity upon disclosure by the judge. If Allied's objection is really genuine, it would have left no stones unturned to trace Junaidah or checked its records in time to raise the objection before the commencement of or during the proceedings in the Court of Appeal. Having expressed its confidence in the learned judge to continue hearing the case, by its participation in the appeal without any reservation. Allied cannot now raise this objection as a ruse to set aside 'irrespective of the merits' an otherwise perfect judgment. We agree with the respondents that Allied's attempt to raise this objection 'smacks of an afterthought.'

In his book *Judicial Ethics in Australia* (2nd Ed, 1997) the Honourable Justice Thomas Am, in his discussion of bias and prejudice as examples of misconduct in office, states, at p 52:

> In general it is unethical for a judge to adjudicate a case whilst actually biased in favour of a party or knowingly having an interest in the result. However an erromeous decision by a judge as to whether there exists a real possibility of appearance of bias does not necessarily raise an ethical question, provided that the problem is disclosed to the parties. It would generally be unethical to fail to disclose to the parties a matter that may be of concern to one of them, so that the question of disqualification could be fairly considered.

And at p 53, he states further:

> There is no doubt that in a situation where there is any reason to think that a relationship exists between the judge and a party or a party's lawyer, the judge and the lawyer each has the duty either to retire from the case or to disclose the relationship to the parties so that the question of disqualification can be considered.
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> Once the problem has been fairly disclosed to the parties, it is not unethical to make an honest error in a conclusion concerning the appearance of bias especially if such a conclusion is one upon which minds can reasonably differ.

In Malaysia, pursuant to cl (3A) of art 125 of the Federal Constitution, the Yang di-Pertuan Agong has prescribed the Judges Code of Ethics 1994 to govern, the judicial conduct of judges. The breach of any provision of the Code may constitute a ground for the removal of the judge from office. Paragraph 3(1)(a),(b) and (c) is relevant to our discussion. It provides:

> (1) A judge shall not —
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> (a) subordinate his judicial duties to his private interests;
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> (b) conduct himself in such manner as is likely to bring his private interests into conflict with his judicial duties;
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> (c) conduct himself in any manner likely to cause a reasonable suspicion that—

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> (i) he has allowed his private interests to come into conflict with his judicial duties so as to impair his usefulness as a judge; or
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> (ii) he has used his judicial position for his personal advantage …

Under the Anti-Corruption Act 1997 ('the ACA'), the definition of 'officer of a public body' includes 'a judge of the High Court, Court of Appeal or Federal Court'. Under subsection (1) of s 15 of the ACA, any officer of a public body, which includes a judge, who uses his office or position for any gratification shall be guilty of an offence. Subection (2) of s 15 of the ACA provides:

> (2) For the purpose of subsection (1), an officer of a public body shall be presumed, until the contrary is proved, to use his office or position for gratification when he makes any decision, or takes any action, in relation to any matter in which such officer, or any relative or associate of his, has an interest, whether directly or indirectly.

In view of the provisions of the Judges Code of Ethics 1994 and the ACA on conflict of interests, it is indeed a very serious matter to raise against a judge that he is biased or has a personal interest, financial or otherwise, in any case he is hearing or in any decision he makes in his judicial capacity. If the allegation is true, then not only would his judgment or decision be vitiated, but disciplinary or criminal proceedings may be instituted against the errant judge. However, if the allegation is unfounded, there would be an unwarranted aspersion cast on the integrity of the judge even if the complainant categorically states that he does not question the integrity of the judge in raising such objection or allegation. It is unfortunate that the learned judge now falls victim to his own observation in *Hock Hua Bank (Sabah) Bhd v Yong Liak Thin* [1995] 2 MLJ 213 at p 220:

> I notice an unhealthy trend of late to allege bias too readily against a judicial arbiter on insufficient material. Nothing is more capable of eroding public confidence in the judicial arm of the state than unwarranted and unfounded allegation of bias. It is therefore to be avoided at all costs, if necessary, by having resort to the power to punish for contempt.

To the credit of Dato' RR Sethu, he has raised the issue in a gracious manner with proper respect and due deference to the learned judge in question. However, we do not find any reason to doubt Gopal Sri Ram JCA's impartiality and integrity as a judge in this case. His candour in disclosing his interest is laudable, his conduct of the case is unblemished, and the judgment he delivered on behalf of the Court of Appeal clearly shows that he has applied his mind properly and impartially to the issues in this case. Applying the 'real danger of bias' test, we are satisfied that the objection by Allied is without merit. We accordingly find that Allied's application for leave to appeal based on this issue of bias also fail. In the circumstances, therefore both applications by Allied and the promoters for leave to appeal to this court under s 96 of the CJA are hereby dismissed with

costs. Deposits to be paid out to the respective respondents to account of their taxed costs.

Application dismissed.

Reported by Jafisah Jaafar